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## UNIONS WITHOUT MAJORITY—A BLACK HOLE?

CLYDE SUMMERS\*

In 1935 Congress proclaimed basic rights of American workers in the sweeping words of section 7 of the Wagner Act:

Employees shall have the right to self organization, to form, join and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid and protection.<sup>1</sup>

The fundamental quality of this section as the tap-root and trunk of the statute was underlined by section 8(1), which declared: "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section 7." Other unfair labor practices only elaborated on the all-inclusive words of section 8(1); all were protections of the basic right of section 7. The Taft-Hartley Act did not change the fundamental role of section 7 in the statutory scheme; it remained the tap-root and trunk, with the rest of the statute life-supporting branches.

Over the years, this centrality of section 7 has been obscured by increased focus on section 9, which was worded and intended only to make more effective one form of expressing the section 7 right to bargain collectively. Section 9(a) provides that "representatives selected by a majority of employees in a bargaining unit shall be the exclusive representative, for purposes of collective bargaining of all employees in the bargaining unit." The rest of section 9 provides the standards and procedures for determining whether a union is entitled to the special status as exclusive representative.

At this point, it is crucial to emphasize that section 9(a), by its words and purpose, does no more than give special status to a majority union. It in no way derogates from the section 7 rights of a union without a majority when there is no exclusive representative. Section 9 has commonly been characterized as adopting the principle of "majority rule," without recognizing that its limited role is to give a majority union the status of exclusive representation. This uncritical use of "majority rule" has fostered an unarticulated assumption that when a union lacks a

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1. 29 U.S.C. §§ 151-169 (1988).

majority the employers and the union are not entitled to the full measure of section 7 rights. These rights are lost in a black hole.

That false assumption was articulated by the National Labor Relations Board in *Sears, Roebuck & Co.*<sup>2</sup> An employee in a plant where the union did not have a majority was summoned to a disciplinary interview. He requested the presence of his union representative, but this request was rejected on the grounds the workers did not have a majority union. The Board conceded that the employee was engaged in concerted action and that if the union had majority status denying him this request would be an unfair labor practice under the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*<sup>3</sup> The Board, however, reasoned that "[w]hen no union is present," granting him this right "wreak havoc with fundamental provisions of the Act." "[T]o place a *Weingarten* representative in a nonunion setting is to require the employer to recognize and deal with the equivalent of a union representative, contrary to the Act's exclusivity principle."<sup>4</sup> An employee who refused to go to such an interview without a fellow employee could be discharged. The core of the Board's reasoning is that when a union lacks a majority, "no union is present." There is a black hole of no union rights.

Later the Board shifted its rationale. It declared that where there was not a majority union, "the interests in assuring such representation under section 7 are less numerous and less weighty than the interests apparent in the union setting."<sup>5</sup> Starting from the assumed premise that without a majority union there is no "union setting," the Board discounted the employees' section 7 rights. It disregarded the fact that when there is no majority union the employee's need for presence of a representative is much greater. The disciplinary interview is the last and only chance to present the employee's case; there is no subsequent grievance procedure or arbitration to protect his interests.<sup>6</sup> Regardless of its rationale, the Board's result is clear: an employee's section 7 rights will be given less protection when the union lacks a majority.

Unions, by their focus on organization campaigns for the purpose of winning elections, have helped foster the assumption that a union without a majority have no significant role to play. The dominant, if not

2. 274 N.L.R.B. 230 (1985), *overruled by* E.I. du Pont de Nemours & Co., 289 N.L.R.B. 627 (1988).

3. 420 U.S. 251 (1975).

4. 274 N.L.R.B. at 232.

5. E.I. du Pont de Nemours & Co., 289 N.L.R.B. 627, 630 (1988).

6. For a penetrating analysis of this series of cases, see Morris, *NLRB Protection in the Non-Union Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1730-50 (1989).

exclusive, emphasis in organizing is not to increase membership, but to obtain majority status. Indeed, during an organizational campaign employees are commonly not asked to join the union, but only to sign cards authorizing the union to represent them. The objective is to obtain the status of exclusive representative through voluntary recognition by the employer or through a Board election. If the union fails in this objective, it commonly assumes that it has no continuing role except, perhaps, to try again another year. Unions, thereby, tacitly accept the Board's characterization that if they are not the exclusive representative they have no representation function. In the absence of a majority, the union is not "present" in the plant.

The union's perspective that the election campaign is a life and death struggle is not only shared, but embraced, by employers. It makes the life of the union dependent on the outcome of an election where the employer has crucial advantages, especially under existing Board decisions. *First*, the employer can compel a union to seek an election by simply refusing to accept authorization cards as evidence of majority status, regardless of the number of cards.<sup>7</sup> *Second*, the employer can use a wide variety of procedural devices to delay the election giving time to mount an intensive and extended anti-union campaign. The longer the election is delayed, the less the union's chance of winning.<sup>8</sup> *Third*, the employer has built-in advantages in the campaign through its ability to interrogate employees, hold captive audience speeches, distribute literature, compel foremen to campaign against the union, and gain access to the public media. In addition, the employer's control over jobs and the workplace enables it to make fear-provoking "predictions," to lead employees to believe that future promotion may depend on their attitude toward the union, and to threaten to go out of business.<sup>9</sup> If the employer stumbles or deliberately steps across the boundary into illegal threats or coercion, the worst that can happen is that a new election will be ordered months later. The employer gains added time to campaign, using the same devices and the same statements more subtly worded, with the employees remembering and reading in the past coercion. Even overtly discriminatory discharges which ultimately lead to reinstatement and back pay may cost the employer less than a union victory in the election.

When the union loses the election, it commonly abandons the field, seldom attempting to maintain a functioning organization in the plant,

7. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

8. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1795-1803 (1983).

9. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

except where there is hope that the union can mount a winning campaign the next year. The union ceases to exist as an organization representing the interests of those who supported it, and leaves the local leaders in the plant who declared their support of the union to the tender mercies of the employer. The unspoken assumption of both the union and the employer is that when the election is lost there will be no exercise of section 7 rights. All that is left is a black hole.

It is this assumption, that unions without majorities have no significant role under the statute, which I want to address, for my point here is that the union's life need not depend on winning elections. First, I want to map out the potential legal rights and status of non-majority unions under the statute. Most of this is well known terrain, though too seldom travelled by unions. Second, I want to suggest the range of practical possibilities for unions without majorities to represent and serve the interests of workers in the workplace.

## I. LEGAL STATUS OF UNIONS WITHOUT A MAJORITY

Section 7, by its terms, makes no distinction between a union with a majority and a union without a majority. Indeed, the rights guaranteed in section 7 are expressed in terms of rights of employees, and may be exercised with or without a union. Section 9(a) qualifies or limits the exercise of section 7 rights by employees or minority unions only when there is a majority union with exclusive representation rights.

### A. *Protected Concerted Activity*

It has been a truism, at least since *Republic Aviation Corp. v. NLRB*,<sup>10</sup> that during an organizational campaign employees have the right to wear union steward buttons, to distribute union literature, and to solicit union membership on the plant premises, absent special circumstances. The right to distribute literature and solicit membership, the Supreme Court held in *NLRB v. Magnavox Co. of Tenn.*,<sup>11</sup> extends to a minority union even where a majority union is present and the collective agreement prohibits such activity.

These rights do not depend on the union's having or even seeking majority status, but flow from section 7 rights "to form, join or assist labor organization." Thus, in *Eastex, Inc. v. NLRB*,<sup>12</sup> the Supreme Court held that the right to distribute literature extended to distribution

10. 324 U.S. 793 (1934), *reh'g denied sub nom.* *NLRB v. Le Torneau Co.*, 325 U.S. 894 (1945).

11. 415 U.S. 322 (1974), *reh'g denied*, 416 U.S. 952 (1974).

12. 437 U.S. 556 (1978).

of a newsletter urging employees to write letters to legislators to oppose a "right-to-work" provision and criticizing the President for vetoing an increase in the minimum wage. The newsletter urged employees to register to vote with the appeal, "[a]s working men and women we must defeat our enemies and elect our friends." This distribution of political literature was protected, not because it was made by a majority union or related to its function as exclusive representative, but because it was found by the Board to come within the section 7 right "to engage in . . . concerted activities for . . . mutual aid or protection."

Similarly, the right to be a member of a union protects equally membership in minority and majority unions, for section 7 makes no distinction as to which union an employee has a right "to form, join and assist." Again, there is a protected right to support and join a minority, whether or not a majority union is present.<sup>13</sup>

Most importantly, the right to strike or picket for better terms and conditions of employment can be exercised by a union or even by an informal group, at least in the absence of a recognized majority union. In the first year of the statute, the Board held that an employee who left work and solicited others to leave work to protest the discharge of a fellow employee was engaged in protected concerted activity.<sup>14</sup> In another early case, nine garment workers, whose request for an increased piece rate was refused, sat down at their benches and did no work for the rest of the day. At quitting time they were given their paychecks and told not to come back to work. This stoppage by a small group in a large shop was held protected by section 7 and they were ordered reinstated.<sup>15</sup> The line of cases which followed<sup>16</sup> was endorsed by the Supreme Court in *NLRB v. Washington Aluminum Co.*<sup>17</sup> In that case seven machinists walked out, refusing to work in an unheated and bitterly cold shop. When they refused to return until heat was provided they were discharged. The Court stated that it was not necessary for there to be any formal organization but only that they act in concert. They might be replaced, but they could not be discharged.

Sketching of these section 7 rights which may be exercised by em-

13. Section 8(a)(3) and 8(b)(2) permit a union security clause which requires an individual to support financially the majority union's collective bargaining function, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

14. *National New York Packing & Shipping Co.*, 1 N.L.R.B. 1009 (1936).

15. *Matter of Indianapolis Glove Co.*, 5 N.L.R.B. 231 (1938).

16. See, e.g., *Stehli & Co.*, 11 N.L.R.B. 1397 (1939); *Ryan Car Co.*, 21 N.L.R.B. 139 (1940); *Condenser Corp. of Am.*, 22 N.L.R.B. 347 (1940); *Spandico Oil & Royalty Co.*, 42 N.L.R.B. 942 (1942); *NLRB v. Kennametal*, 182 F.2d 817 (3d Cir. 1950).

17. 370 U.S. 9 (1962).

ployees and a non-majority union may seem unnecessary, for they are well-known and undisputed. However, preoccupation with organizational campaigns culminating in elections which, if lost, is considered a requiem for the union, have pushed out of mind the legal rights which survive the loss.

### *B. Collective Bargaining by Non-Majority Unions*

Focus on section 9(a) fosters the unthinking generalization that non-majority unions have no right or legal status to represent employees in collective bargaining. When there is no majority union, this is patently incorrect in three respects. *First*, a non-majority union, or any group of employees, has a legally protected right to present demands and request negotiations. In the first year of the statute, a committeeman of a union which did not represent a majority was discharged for seeking to negotiate reinstatement of a discharged employee. The Board held that the committeeman was exercising rights protected by section 7 and could not be discharged.<sup>18</sup> If the employer refuses to negotiate, the union can strike and the strike will be protected activity. The strikers have the same rights as strikers by a majority union; they may be replaced, but they can not be discharged.

*Second*, individual employees can refuse to discuss terms and conditions of employment with the employer and insist that any negotiations must be with their union representative, even though the union does not have a majority. Section 7 guarantees the right to bargain through "representatives of their own choosing." The employer may be free to act unilaterally without discussion, but it cannot discharge the employee for refusal to bargain individually.

*Third*, a non-majority union can bargain and make a collective agreement for its own members. This has been recognized by the Supreme Court from the first days of the Wagner Act.<sup>19</sup> In *Consolidated Edison Co. v. NLRB*,<sup>20</sup> the Union was allowed to act as the bargaining representative for the employees who were members, even though they lacked a majority. The Supreme Court reaffirmed this in *Int'l Ladies' Garment Workers' Union v. NLRB*<sup>21</sup> where Mr. Justice Douglas in dissent stated, "We have indicated over and again that, absent an exclusive

18. *Cleveland Chair Co.*, 1 N.L.R.B. 892, 903 (1936).

19. *Virginia Ry. v. System Fed.* No. 40, 300 U.S. 515, 549 (1937).

20. 305 U.S. 197 (1938). "[I]n the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had a right to make their own choice." *Id.* at 237.

21. 366 U.S. 731 (1961).

agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members."<sup>22</sup> Such members-only contracts are legally enforceable in the federal courts because section 301 of Taft-Hartley applies to all "suits between unions and employers," with no limitation to majority status of the union.

Members-only contracts have played a significant role in our history of collective bargaining.<sup>23</sup> The earliest agreements of the Iron Molders Union in the stove industry included provisions applicable to employers where the union lacked a majority.<sup>24</sup> A similar pattern was followed in the glass industry.<sup>25</sup> In 1900 when the Mine Workers called a strike in the anthracite coal industry, it had only 8,000 members among 140,000 miners.<sup>26</sup> The Anthracite Coal Commission, convened to settle the strike, made an award which expressly rejected exclusive representation but made the resulting agreement binding only on union members.<sup>27</sup> Members-only contracts continued to be used after the passage of the Wagner Act. The first agreement between the United Auto Workers and General Motors was, by its terms, applicable only to union members;<sup>28</sup> and the recognition agreement in 1937 between John L. Lewis and Myron Taylor, President of U.S. Steel, did not accept majority rule but recognized the union as representative for members only.<sup>29</sup>

Recognition of non-majority unions remains an accepted device in our collective bargaining system. The Meyer-Milias-Brown Act governing public sector bargaining in California provides for non-exclusive representation.<sup>30</sup> Executive Order 10988, issued in 1962 to establish collective bargaining by federal employees, required formal recognition of a union having a substantial and stable membership of no less than 10% where no other union was qualified for exclusive recognition.<sup>31</sup> In 1969,

22. *Id.* at 741 (Douglas, J., dissenting). Although this statement was made in a dissenting opinion, it was accepted by the majority which found that the union committed an unfair labor practice because, while a minority, attempted to act as an exclusive representative, making a contract which purported to cover all employees.

23. Majority rule was not an established principle in determining union representation in the 19th century. It all depended on the union's show of economic strength. M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965* (1970).

24. REPORT OF UNITED STATES INDUSTRIAL COMMISSION 861-64 (1900).

25. *Id.* at 830, 898-900.

26. S. PERLMAN & P. TAFT, 4 *HISTORY OF LABOR 1896-1932* 34-36 (1935).

27. REPORT OF THE ANTHRACITE COAL COMMISSION, S. DOC. NO. 6, 58th Cong. Spec. Sess. 79 (1903).

28. M. DERBER, *supra* note 23. This was typical of the first collective agreements in the auto industry. 20TH CENTURY FUND, *HOW COLLECTIVE BARGAINING WORKS* 595 (1942).

29. 20TH CENTURY FUND, *supra* note 28, at 544.

30. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719 (1971).

31. 27 C.F.R. 551 (1962).



Executive Order 11491 eliminated the requirement of formal recognition of minority unions but gave national consultation rights to unions representing a substantial number of employees.<sup>32</sup>

Section 7 thus protects officers of a non-majority union who seek to bargain on behalf of its members; entitles employees to insist on bargaining only through the union; protects employees who strike to compel an employer to bargain with the non-majority union; and section 301 makes a members-only contract legally enforceable.

It is commonly considered, however, that the employer has no duty to bargain with a non-majority union, and that a strike to compel such bargaining is not an unfair labor practice strike but an economic strike making the strikers vulnerable to permanent replacement.<sup>33</sup> This conclusion, however, has strikingly slim support in the words or the purposes of the statute, or in Board or court decisions.<sup>34</sup> Though it may be much too late to open this question, examining it may at least suggest how our focus on section 9 rather than on section 7 has caused us to over-read the limited scope of majority rule.

Section 7 states as one of employees' basic rights, the right "to bargain through representatives of their own choosing." It is not stated as a qualified right to bargain through a representative of the majority's choosing but of "their own" choosing. This is, of course, qualified by section 9(a), but that qualification, by its terms, applies only when there is a "representative selected by a majority." The employer's refusal to meet and deal with a non-majority union would "interfere" with its members' exercise of this section 7 right "to bargain through representatives of their own choosing," contrary to Section 8(a)(1).

Section 8(a)(5) proscribes as an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Again, section 9(a) provides only that the representative selected by the majority shall be the exclusive representative. It does not state that a union without a majority is not the representative of its members for purposes of collective bar-

32. 34 C.F.R. § 17,605 (1970).

33. For an early reading of Section 9(a) as requiring an employer to bargain with a non-majority union, see Latham, *Legislative Purpose of the Wagner Act*, 4 GEO. WASH. L. REV. 433, 453 (1936).

34. The Board has never held that an employer can refuse to meet and bargain with a non-majority union. In *Pennypower Shopping News, Inc.*, 244 N.L.R.B. 536 (1979) and *Swearingen Aviation Corp.*, 227 N.L.R.B. 228 (1976), there is only dicta by the Administrative Law Judge. In both cases striking employees were reinstated. In *Charleston Nursing Center*, 257 N.L.R.B. 554 (1981), there is dictum by the Board in a case where the Board found that the employer had not refused to meet with the group, but had reasonably refused to meet until two days later.

gaining. To so read section 9(a) would eviscerate the basic section 7 right of employees "to bargain through representatives of their own choosing." The plain words of section 7, section 8(a)(1) and section 8(a)(5) would seem to require an employer, in the absence of a majority union to bargain collectively with a non-majority union for its own members.

The history of the majority rule principle shows that its purpose was not to limit the ability of a non-majority union to represent its own members, but to protect a majority union's ability to bargain collectively. Section 9 was built on the experience under section 7(a) of the National Recovery Act guaranteeing employees "the right to organize and bargain collectively." The key case under section 7(a), repeatedly referred to in legislative reports and debates was *Houde Engineering Corp.*<sup>35</sup> decided the preceding year. In that case, the Auto Workers had won an election but the company insisted that it was obligated to bargain also with a minority union which was employer dominated. The Board ruled that this frustrated the process of collective bargaining by creating division and dissension between the two unions and ordered the employer to bargain exclusively with the majority union.

In the reports and legislative debates, preceding the Wagner Act, the arguments for majority rule were made in the context of competing unions and the necessity that the majority union have exclusive authority to negotiate for all employers.<sup>36</sup> The purpose of an election was to determine which, if any, union was to be given exclusive representation rights, thereby empowering it to represent non-consenting employees.<sup>37</sup> There was no suggestion that a majority, by preferring individual bargaining, could deprive a minority of their right to bargain collectively for themselves through representatives of their own choosing.<sup>38</sup>

35. I N.L.R.B. (old) 35 (1934). For a previous similar case reaching the same result, see *Denver Tramway Corp.*, I N.L.R.B. (old) 64 (1934).

36. Although statements in congressional reports, taken out of context, seem to reject bargaining with a non-majority union and members-only contracts, these statements were made with reference to bargaining by competing unions. H. REP. NO. 969 ON H.R. 9798, II LEG. HIST. OF NLRA, 2928 (1935); S. REP. NO. 573 ON S. 1958, II LEG. HIST. OF NLRA 213.

37. The Railway Labor Act, which provided the model for the National Labor Relations Act provided in section 2(4), "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act." The provision does not say "whether" the employees shall be represented, but "who" shall represent them. Under the Railway Labor Act, ballots in representation elections do not include the choice of "no union," but only the names of the competing unions. See *Brotherhood of Ry. and S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

38. In *Houde Engineering*, the Board stated that its rule would not apply "where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask the Board for appropriate relief." I N.L.R.B. (old) at 44. The inference is that in the absence of bargaining by a majority union, there was an obligation to bargain with a non-majority union.

Bargaining collectively with a non-majority union for its own members is not impracticable. Indeed, it is practiced, if not legally required, in almost every country which has a system of free collective bargaining. The American notion that an employer has no duty to bargain with a union until it has obtained a majority is unknown and unthinkable in most other countries. In those countries the collective agreement is legally binding only for union members; the employer remains free to provide more, less, or different benefits to non-members and to settle their grievances without the intervention by the non-majority union.<sup>39</sup>

To be sure economic strength of a non-majority may not be great, and the employer might resist agreeing to benefits for members which it was not prepared to extend to other employees. The non-majority union's position, however, would not be significantly different from that of a union which had a majority in a bargaining unit encompassing only a minority of the employer's work force. Negotiation with a non-majority union could serve the purpose of leading each side to understand better the needs and desires of the other side, and help find solutions which might be mutually accepted. More importantly, it could provide a grievance procedure to which individual employees could resort with assurance of an uncompromised advocate.

We have probably proceeded too long on the questionable assumption that the employer has no affirmative duty to bargain with a non-majority union to now recognize that duty short of a statutory amendment. Non-majority unions certainly cannot now rely on such a statutory right. There is clearly, however, the more limited protection that a non-majority union can represent its members, the members can refuse to deal with the employer except through the union, and the union can strike to induce the employer to bargain with it, to adjust a grievance, or to make a members-only contract.

39. The employer's providing different terms for members covered by the collective agreement and other employees not covered does not violate section 8(a)(3) or 8(b)(2). Violation of section 8(a)(3) "normally turns on whether the discriminatory conduct was motivated by an anti-union purpose." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Complying with a members-only contract would not be so "inherently destructive of employee interests" that it "bears its own indicia of intent," but serves a legitimate business end, particularly in view of the Supreme Court's endorsement of members-only contracts in *Int'l Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).

If the employer refused to give the non-majority union substantially the same benefits it gave other employees, this might be evidence of discrimination requiring the employer to come forward with explanations, but giving the non-majority union better terms in return for contractual stability would carry its own justifications.

## II. PRACTICAL POSSIBILITIES FOR UNIONS WITHOUT MAJORITIES

A sketch of existing rights makes clear that a non-majority union has a range of legal protections entitling it to maintain a visible presence in the workplace and to represent its members in matters related to their work. As a base, it can maintain in-plant committees which may even meet in the plant at least briefly during non-working time. It can designate employees as union stewards, identify them with union steward buttons, and through them maintain contact with member and non-member employees. Taking further advantage of *Republic Aviation*, its members can distribute in the plant, in non-working areas during non-working time, literature publicizing and protesting working conditions in the plant and other matters related to their work situation, such as the calculation and payment of bonuses, structuring of a profit sharing plan, setting of incentive rates, scheduling of vacations, operation of the credit union, and even the selection and conduct of foremen.<sup>40</sup> Employer communications can also be countered by a union leaflet distributed in the workplace during non-working time. The union can, through its members in the plant, be the voice of employees on all matters of common concern. Under *Eastex* this may extend to distributing literature on political issues related to employment issues generally, although not of immediate concern to the employees.

Union stewards and officers may learn of grievances of fellow employees, and the in-plant committee can present those grievances to management. If management refuses to meet and discuss with the committee, employees may leave their work as a group to request discussion of the problems with management directly.<sup>41</sup>

If the employer refuses to meet and negotiate with the non-majority union, or if the employer's response is unsatisfactory, the union may picket<sup>42</sup> or engage in a stoppage or walkout.<sup>43</sup> Although the striking employees are vulnerable to replacement, this vulnerability can be reduced by engaging in the stoppage without notice, and offering to return to work before the employer can install replacements. Repeated short term

40. The right to protest, as contrasted to the right to strike, is not limited to mandatory subjects of bargaining, *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845 (1948); *NLRB v. Guernsey-Muskingum Elec. Co-operative, Inc.*, 285 F.2d 8 (6th Cir. 1960); *G & W Elec. Speciality Co.*, 154 N.L.R.B. 1136 (1965).

41. *NLRB v. Kennametal, Inc.*, 182 F.2d 817 (3d Cir. 1950).

42. Picketing, which sought to induce the employer to meet and negotiate concerning a particular grievance, would seem not to be "recognition" picketing within 8(b)(7), but rather governed by the same rationale as "area standards" picketing. Picketing to obtain a members-only agreement would raise a more difficult question, but it lacks the underlying reason for section 8(b)(7)—to limit the use of economic pressure to compel unwilling employees to be represented by the union.

43. *Indianapolis Glove Co.*, 5 N.L.R.B. 231 (1938).

stoppages on the same grievance may result in the Board characterizing it as an unprotected partial or "piecemeal" strike, making the employees subject to discharge.<sup>44</sup> Other devices, such as "work to rule" and sick-outs, may be more difficult for the employer to counteract. Although such measures create only limited economic pressure on the employer, their potentially disruptive effect may induce the employer to discuss problems and make a tolerable adjustment.

A non-majority union can provide the shield of "concerted activity" for an individual employee who refuses to drive a truck with faulty breaks, reports violations of the Occupational Safety and Health Act, refuses to act in violation of professional ethics or personal morality, or sues for unpaid overtime. The individual, by making the report or protest through the union, relying on established union policy or obtaining endorsement by the union, converts his or her individual action into "concerted activity" and obtains the protection of section 7. Where a non-majority union exists, no employee need be vulnerable under *Meyers Industries, Inc.*<sup>45</sup>

Although these activities by members of a non-majority union are protected under section 7, the protection is obviously not fully effective. Legally prohibiting the discharge of employees engaging in these activities does not necessarily prevent their discharge. It guarantees them only a long delayed and uncertain order of reinstatement with back pay by the Board. Not all union members are willing to take this risk. The non-majority union unquestionably is in a relative weak economic and legal position.

A more fruitful role for the non-majority union is to help employees know and enforce their individual employment rights. For example, many employees do not know the full scope of their rights under workmen's compensation. They often do not know that injuries such as gradual loss of hearing, heart attacks, facial scars and emotional problems may be compensable. Many do not know when or how to file claims, or how to prove them. Few realize that they may have third party tort claims, particularly for defectively designed equipment or toxic materials. The union can establish a committee within the shop to distribute literature describing the kind of injuries covered. The committee can

44. *International Union, U.A.W.A., A.F.L., Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949).

45. 281 N.L.R.B. 882 (1986). The Board stated that "joint employee action is the touchstone" and that concerted activity "requires some linkage to group action." This "linkage" may be very loose. See *Salisbury Hotel, Inc.*, 283 N.L.R.B. 685 (1987); *Every Woman's Place, Inc.*, 282 N.L.R.B. 413 (1986). *Morris, supra* note 6, at 1716-30.

learn of injuries by employees, help them file claims, and help gather evidence to prove their claims. The union can provide the injured employee representation or help obtain a competent representative to present the compensation claim, and a competent lawyer where third party actions may be possible. Some unions have developed effective plans of this kind, but they are established only where the union has majority status. Such plans could as well be established by unions without majorities.

Similarly, in-plant committees could help employees know and enjoy the full measure of their other entitlements such as medical benefits, sick leave, severance pay and pensions provided by employer established plans. The union could help employees claim and collect statutory entitlement such as unemployment compensation, disability pay, social security and various welfare benefits. It could consolidate suits under the Wage-Hour Law for failure to pay the minimum wage or the required overtime premiums where separate individual suits would not be worth litigating.

The expansion of common-law doctrines increases individual employment rights such as the "handbook rule," reading provisions of employee manuals into employment contracts, public policy exceptions to employment at will, implied covenants of good faith, and torts such as outrageous conduct, defamation, and invasion of privacy create a need by employees and an opportunity for a non-majority union to provide advice and legal representation.

The most important potential function of a non-majority union is enforcement of the Occupational Safety and Health Act ("OSHA"). Statutory enforcement procedures provide a series of openings to a union which establishes an active in-plant safety committee. A complaint of a violation may be filed with OSHA by any "employee or representative of employees," allowing formal complaints to be filed through the union. A formal complaint triggers an inspection, and a member of the safety committee may then be allowed as a "representative of employees" to accompany the inspecting compliance officer and discuss the claimed violations. In a scheduled inspection, one not initiated by a complaint, a "representative of employees" is entitled to participate in the opening conference, accompany the compliance officer in the "walkaround" the plant and attend the closing conference. Although a non-majority union will not necessarily be considered a "representative of employees," the compliance officer may select a member of the safety committee to act as a representative. If no employee representative is selected, the compliance officer "shall consult with a reasonable number of employees concerning

matters of safety and health in the workplace." This will give the safety committee an opportunity to call attention to unsafe conditions in the plant.

If the compliance officer finds violations, the non-majority union may, in the name of an employee, contest the period of time allowed to abate the violation as unreasonable, and can act as representative of the named employee in the proceedings before the Occupational Safety and Health Review Commission ("OSHRC"). If the employer contests the citation, any "affected employee" has a right to intervene, and the non-majority union can again act as representative of employees in the proceedings before OSHRC. Although the non-majority union does not have the status of a majority union, it can play a significant role in filing formal complaints and participating in inspections. In proceedings contesting citations before OSHRC, it can, in fact, though not in name, play the same role as a majority union.

The safety committee can play an equally effective role in enforcing the Hazard Communication Standard. It can file a complaint that the employer is not properly labelling toxic substances, is failing to provide toxic hazard training to employees, or has not prepared a written hazard communication program. By obtaining written authorization from an employee, the committee is entitled to access to Material Safety Data Sheets ("MSDS") showing the chemical content of toxic substances used, to the exposure records and medical records of employees exposed to toxic substances, and to any analyses of such records.

The non-majority union is not limited to these procedural rights in enforcing safety and health standards. The union may distribute literature or otherwise call the employees' attention to violations of the standards, and it may generally publicize violations by the employer. Members of the safety committee and other union members who join in these actions have double protection. By acting for or with their union they are protected by section 7 of the NLRA, for they are engaging in "concerted action . . . for mutual aid and protection." In addition, they are protected by section 11(c) which prohibits discrimination against an employee for exercising any rights afforded by the Act.

Under OSHA, employees can refuse to perform dangerous work only when there is reasonable apprehension of death or serious injury and reasonable belief that no less drastic alternative, such as seeking correction by an employer or filing a formal complaint, is practicable. A union, majority or non-majority, by advocating or supporting an individual's refusal to work, can convert the individual's action into concerted

action within the protection of section 7, even though it does not fall within the limited protection of OSHA.

The central point here is that a non-majority union can represent employees for the purposes of enforcing OSHA. It can perform substantially the same functions as a majority union, except for those added rights which might be obtained by the collective bargaining agreement.

There is neither time nor need to canvass the functions which non-majority unions could fulfill in making real other individual employment rights under the evolving common law or under statutes, such as plant closure laws, pregnancy leave acts, polygraph and privacy laws, and whistleblowing statutes. There is need, however, to point out that judicially created doctrines establishing employment rights and employment protection statutes are proliferating at a rapid rate, largely because of the recognition that the shrinking sphere of collective bargaining cannot provide protection. The failure of unions to achieve and maintain majorities is increasing the necessity for non-majority unions to play a significant role. When unions cannot represent employees for the purpose of collective bargaining, non-majority unions can represent employees for the protection of individual employment rights.

Looking to potential future legislation, the most significant proposal for non-majority unions is to provide all employees broad protection from unjust discharge through procedures modeled on labor arbitration.<sup>46</sup> Passage of such legislation, which is now supported by the AFL-CIO, will provide an opportunity for unions in every workplace to represent middle and lower income workers who cannot afford a lawyer. At the same time, it will give added protection to non-majority unions in their other functions because employees vulnerable to discharge for engaging in those activities will not have to rely on the narrow protection and slow procedures of the Board. They will have the broad protection of "just cause" and the faster procedures of arbitration.

### III. OBSTACLES TO REALIZING THE POSSIBLE

The possibilities open to unions without majorities seem so obvious that one must ask why unions have not done more to develop them. Perhaps these possibilities are only ivy tower creations born of hope that unions can find a new and needed role in our society. But I believe that there are other factors which have made unions slow to explore these possibilities.

46. See, for example, the Model Employment Termination Act adopted by the National Conference of Commissioners of Uniform State Laws, Aug. 1991.



*First*, unions seem to have been captured and imprisoned by the misconception of the function of majority rule. The ultimate objective of unions has been obtaining a collective agreement, and this can best be achieved when the union obtains exclusive representation rights. Unions have, therefore, understandably focused on the objective of obtaining this statutory status. Preoccupation with this objective, which requires a majority, has generated the assumption that a union without a majority has no purpose other than to obtain a majority. That assumption has become so deeply rooted that unions have forgotten and been slow to remember that unions can serve other useful though lesser functions in the workplace.

So long as unions continued to grow and win elections, and so long as the coverage of collective agreements expanded, this single-minded objective of obtaining majorities and making collective agreements was sufficient. Only in 1985 did the AFL-CIO begin to suggest that unions might serve the interests of employees who are not in organized bargaining units. Even so, this suggestion consisted of only two paragraphs in a thirty-four page booklet with the forward-looking title "The Changing Situation of Workers and Their Unions."<sup>47</sup> Nothing was said about the potentialities of unions without majorities providing representation of employees and their interests in the workplace. Today unions still seem imprisoned by their unthinking assumption that without a majority a union is nothing.<sup>48</sup>

*Second*, the typical union dues structure discourages allocating resources where unions lack, and have no near prospect of achieving, a majority. Dues are generally fixed at the level needed to support the negotiation and administration of collective agreements including grievance procedures and arbitration. Employees not covered by collective agreements are not expected to remain active members and pay regular dues. Indeed, some unions require withdrawal from the union when a member leaves a unionized unit. The result is that no money is available where the union lacks a majority. Only in 1985, did the AFL-CIO recommend new categories of "associate" membership with reduced dues. The projected services to be provided included none of the in-plant representation activities suggested here, and the use of the term "associate"

47. AFL-CIO Committee, REPORT ON THE EVOLUTION OF WORK 19-20 (1985).

48. The working assumption that without a majority a union has no value continues. In the section on "Improving Organizing Activity," the Report states, "Before a union expends significant resources on an organizing campaign, objective analysis should be done of the likelihood of successfully securing majority support and negotiating a first contract." *Id.* at 28.

member betrays the assumption that they are not really union members but purchasers of services.

The cost of supporting union activities where the union lacks a majority is substantial, though less than when there is an established bargaining relationship with a collective agreement and a grievance procedure with arbitration. The potential cost, however, seems more an excuse than an answer. There has been no effort, to my knowledge, to determine the level of dues necessary to support such activities by non-majority unions. Nor has there been any inquiry as to the willingness of a substantial number who supported the union during its organizing campaign to contribute the time, effort and money necessary to make the non-majority union effective.

*Third*, the assumption that non-majority unions have no function is welcomed and reinforced by employers. It relieves them of any burden in dealing collectively with their employees so long as they can prevent the union from obtaining a majority. With the present legal rules and climate they are able to discourage unions in seeking elections and win half the time when unions go to a vote. By persuading half of their employees to vote "no union," they are able to assert that the others should not exercise their section 7 rights.

#### IV. CONCLUSION

During the last twenty-five years the proportion of private sector workers covered by collective agreements has steadily shrunk. For much of that period the shrinking was disguised by an increase in the size of the employed work force and the rapid growth of public sector unions. During the last ten years the slide has been steeper and more openly recognized. This is, in my view, a tragic trend, for collective bargaining serves vital social and political purposes. *First*, it serves economic justice by creating a collective labor market with more equal bargaining power between employers and employees. *Second*, it thereby serves to reduce the need for government intervention to protect employees from their economic vulnerability, leaving regulation to market forces in that collective market. *Third*, it serves to bring a measure of due process and democracy to the workplace. We must either rebuild and expand collective bargaining or find alternative structures to serve these social and political purposes.

My purpose here has been to explore the potential of non-majority unionism within our existing legal framework, not to belabor its limitations. Obviously, a non-majority union is no substitute for an economi-

cally strong union with complete, recognized bargaining rights. Even at best, a non-majority union can provide less than half a loaf of economic justice and industrial democracy. But a union without a majority can provide workers a measure of protection, either by collective action or legal representation. It can maintain the bonds between those who believe in unions and want to belong, and it can offer a continuing visible presence in the workplace.

My focus has been on the potential role of the non-majority union as representative of a minority of employees—the functions it can perform in the absence of majority status. I have said nothing about how non-majority unions can obtain majority status. But the union's demonstration of its continued concern for the rights of employees and its ability to provide some protection of those rights can be the most persuasive path to achieving majority status.